Filed 3/9/12 P. v. Sample CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. CEDRIC SAMPLE, Defendant and Appellant.	H036234 (Monterey County Super. Ct. No. SS101430)

Defendant Cedric Sample appeals from a judgment of conviction entered after a jury found him guilty of making a criminal threat (Pen. Code, § 422) and violating a court order (Pen. Code, § 273.6). In a bifurcated proceeding, the trial court found that defendant had suffered a prior strike conviction (Pen. Code, § 1170.12, subd. (c)). Defendant contends: (1) the trial court abused its discretion in admitting evidence of a prior act of domestic violence; (2) the trial court erred by refusing his request to modify CALCRIM No. 1300; (3) the prosecutor committed misconduct; and (4) the trial court violated his Sixth and Fourteenth Amendment rights by depriving him of a jury trial on the prior conviction allegations. We affirm.

I. Statement of Facts

Latonya Allen testified that she was 17 years old when she met defendant in 1999. Shortly thereafter, they became involved in a romantic relationship. However, by 2001, their relationship became "very rocky," and she was seeing defendant "on and off." One evening in 2002 when she was eight months pregnant, defendant told her that he believed she was thinking about another man when she said his name. He then began acting "a little weird," and asked her to come with him to get some food. As they were driving in the car, he told her that he was going to take her to Fort Ord and kill her. When they reached one of the abandoned houses at Ford Ord, he parked in the garage and Allen pleaded with him not to kill her. After about 15 minutes, he told her to get out of the car. Defendant also told her that if he let her go she would tell somebody, and he tried to choke her. At one point, Allen said that something was wrong with the baby and he stopped. Defendant then flipped a coin twice to determine whether he was going to finish what he had started. After the second coin toss was in her favor, he slapped her face before allowing her to get back in the car. They returned home and watched television for a few hours. However, defendant then started to pull her hair and tried to suffocate her with a pillow. After Allen ran out of the room, defendant took all her money and hopped out of the window. Allen gave birth the following day.

Allen tried three or four times between 2002 and 2008 to obtain a restraining order against defendant, but she could never find him to serve him. However, she eventually served him in 2008. Allen had sole custody of their daughter, and their daughter was also a protected party in the restraining order. After Allen obtained the restraining order, defendant came to her house twice.

At about 7:00 p.m. on May 29, 2010, Allen was watching television in her bedroom when she saw defendant at her window. The blinds were up, the window was open, and there was no screen. Allen ran to tell her mother, called the police, and then told defendant to leave. Defendant would not leave, telling her that they needed "to work

this out" without involving the courts. After they argued with each other for "awhile," defendant tried to climb through the window and Allen slapped his hand. Defendant retreated and became angrier. He yelled at her that "he was going to kill her" and "kept asking [her] if [she] wanted to die." He also yelled that "he was going to have two guys come over and take care of" her. Allen was scared because she had been dealing with him for the past 11 years. During the incident, Allen was speaking with the 911 operator.

Mauro Valencia, Allen's brother, testified that he lived with his mother, Allen, and her daughter. He heard his sister and defendant yelling on the night of the incident. Defendant wanted to see his daughter, and at one point, he yelled, "Do you want to die?" He also said, "I'll call people right now," and "I'll take care of your family." Defendant's head was in the window, and he brought out a cell phone.

Anna Fierro testified that she lived across the street from Allen. She also heard yelling coming from Allen's house and she called 911. Fierro saw a man trying to enter the house through a window. Both Allen and the man were yelling. She heard him say that he was going to get someone to hurt her.

Officer Devin Church testified that when he arrived at the scene, he found defendant 75 to 100 feet away from Allen's house. Defendant initially denied being present at Allen's house, but later admitted that he had been there. He denied threatening to kill Allen. When Officer Church interviewed Allen, she stated that she did not know whether defendant had used the word "kill." Allen told the officer that she was terrified of defendant because he had tried to strangle her at Fort Ord.

II. Discussion

A. Admissibility of Evidence of Prior Acts of Domestic Violence

Defendant contends that the trial court abused its discretion by admitting evidence of the prior domestic violence incident at Ford Ord under Evidence Code sections 1109 and 352.[1]

Prior to trial, defendant sought to exclude evidence of prior domestic violence incidents between 2000 and 2008. The prosecutor sought to admit evidence of the incident in 2002. Defendant argued that the evidence of the 2002 incident should be excluded because it was remote and more inflammatory than the charged offense. The trial court found that the evidence was admissible, stating: "The Court feels that, even with the age of the prior, which is not more than 10 years ago, that the probative value does outweigh the prejudice and will allow evidence of the prior domestic violence allegation that is described in the People's trial brief. [¶] The Court does not find that it would necessitate an undue consumption of time based on the fact that the complaining witness will already be testifying. [¶] . . . [¶] . . . The Court also does not feel it would create a substantial danger of undue prejudice or confuse the jury or mislead the jury. The Court will certainly in its instructions advise the jury of how it is permitted by law to evaluate such evidence. I think it is admissible under 1109. [¶] I do also think it goes to the elements of the offense of the 422, that the victim was in sustained fear for her own safety and that her fear was reasonable under the circumstances. I will allow it for that purpose."

In general, evidence that a defendant has committed a prior crime other than the charged offense is generally inadmissible to prove his or her disposition to commit the charged offense. (§ 1101.) However, there are exceptions to this general rule in cases involving sex offenses (§ 1108) and acts of domestic violence (§ 1109). Under section

---

[1] All further statutory references are to the Evidence Code unless otherwise noted.

1109, the defendant's other acts of domestic violence are admissible to prove propensity to commit the charged offense if the evidence is not inadmissible under section 352.[2] (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024.) This evidence is relevant not only to corroborate a victim's allegations of the current offense (see *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1332), but also to prove elements of the charged offense. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 814-815.)

Section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing issues, or of misleading the jury." In reviewing the admissibility of evidence under sections 1109 and 352, trial courts consider the "nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense . . . . [Citations.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)[3] This court reviews the admissibility of this evidence under the abuse of discretion standard, and thus the trial court's "exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233.)

---

[2] Section 1109 states that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not made inadmissible pursuant to Section 352." (§ 1109, subd. (a)(1).)

[3] Cases that analyze the application of section 1108 apply to cases involving section 1109 because the statutes are similar in intent and effect. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333.)

Defendant argues that the prior incident of domestic violence was not similar to the charged offense, and thus this evidence had little, if any, probative value. He asserts that the prior incident involved a violent physical assault when he was in an intimate relationship with Allen while the charged offense was "merely a verbal altercation" when he violated a restraining order and attempted to reconcile with her. However, defendant threatened to kill Allen in both incidents. More importantly, the evidence was highly relevant to prove elements of the offense, that is, the existence and reasonableness of Allen's fear that defendant would carry out his threat. That defendant had previously threatened to kill her and then carried out that threat by attempting to kill her was extremely probative to show that defendant's statements "Do you want to die?" and "I'll call people right now" caused Allen "reasonably to be in sustained fear for . . . her own safety . . . ." (Pen. Code, § 422, subd. (a).)

Defendant argues that the prior incident was remote, and thus prejudicial. Though the prior incident occurred eight years prior to the charged offense, it was not presumptively inadmissible under section 1109, subdivision (e). Moreover, as noted in defendant's motion in limine, he had been involved in prior domestic violence incidents between 2000 and 2008. Given defendant's history of domestic violence, the prior incident was not too remote to be probative. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 534.)

Defendant next contends that the evidence of the prior incident consumed a significant amount of time at trial. However, when the trial court ruled on defendant's objection, the prosecutor's summary of the incident did not appear to pose a risk of being unduly time consuming. In fact, direct testimony of the incident consumed only 13 pages of the reporter's transcript. Thus, though cross-examination and redirect examination consumed a greater portion of Allen's testimony, this factor did not weigh in favor of exclusion of the evidence.

Defendant also argues that the evidence of the prior incident did not come from an independent source and he was not convicted of the prior offense. Under these circumstances, there will always be less "certainty" than there would be if there had been a conviction, and consequently an additional burden on the defendant to defend against the uncharged acts as well as a potential danger that the jury would want to convict defendant to punish him for the past offense. Nevertheless, these are just three of the relevant factors that a trial court must weigh in balancing probative value against undue prejudice.

Defendant next argues that the prior incident was significantly more inflammatory than the current offense. In the prior incident, defendant not only threatened to kill a pregnant Allen, but also attempted to do so. In the current offense, he was not physically violent. However, "'[t]he "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Here, defendant initially denied making the threat, but his defense was that the circumstances under which his statements were made were not such that a reasonable person would interpret them as sufficiently unconditional, immediate, or specific. (Pen. Code, § 422.) Thus, the evidence of the prior incident countered the defense. While the evidence of the prior incident was likely to have an impact on the jurors, this impact was not *unduly* prejudicial but merely the consequence of the probative value of the evidence. Moreover, the jury was not likely to be confused or misled as this evidence concerned an event that occurred at a different time than the charged offense.

The prejudicial factors weighing against the substantial probative value of this evidence were the degree of certainty, the burden on defendant in defending against the uncharged acts, and the possibility that the jury would convict him to punish him for the

prior incident. However, the trial court could have reasonably concluded that those factors did not substantially outweigh the probative value of this evidence. Thus, the trial court did not abuse its discretion in admitting this evidence.

Defendant also contends that the admission of this evidence rendered his trial fundamentally unfair and thus requires reversal unless harmless beyond a reasonable doubt. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70.) Given that we have concluded that the evidence was properly admitted, we reject this claim.

B. Requested Modification to CALCRIM No. 1300

Defendant contends that the trial court erred by denying his request to modify CALCRIM No. 1300.

The trial court must instruct on all elements of the charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) "[T]he general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. [Citation.] Instructions should also be refused if they might confuse the jury. [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 659.) Moreover, "'"'[i]n determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]'"'" (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.)

Here, the trial court instructed the jury pursuant to CALCRIM No. 1300, in relevant part: "The defendant is charged in Count 1 with having made a criminal threat, in violation of Penal Code Section 422. To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Latonya Allen; two, the defendant made the threat orally; three, the defendant specifically intended that his statement be understood as a threat; four, the threat was so clear, immediate, unconditional and

specific that it communicated to Latonya Allen a serious intention and the immediate prospect that the threat would be carried out; five, the threat actually caused Latonya Allen to be in sustained fear for her own safety; and six, Latonya Allen's fear was reasonable under the circumstances."

Defendant contends that the trial court should have modified this portion of CALCRIM No. 1300 to add the phrase "on its face under the circumstances in which it was made" immediately following the word "threat" in the fourth element of the instruction. The modification would have tracked the language of Penal Code section 422.[4] Defendant argues that the modification "would have properly focused the jurors on the circumstances surrounding the current offense, rather than the more inflammatory prior incidents." We disagree.

Though CALCRIM No. 1300 uses slightly different language than Penal Code section 422, it correctly defines the elements of the offense. Defendant has overlooked that CALCRIM No. 1300 also states: "In deciding whether a threat was sufficiently clear, immediate, unconditional and specific, consider the words themselves as well as the surrounding circumstances." In our view, there is no significant difference between instructing the jury to consider "the words themselves" and "[t]he threat on its face." Nor are we persuaded that CALCRIM No. 1300 would have focused the jury's attention on the prior incidents. Both CALCRIM No. 1300 and the requested modification told the jury to consider the "surrounding circumstances" in determining whether "[t]he

---

[4] Penal Code section 422 provides that a criminal threat occurs when a person "willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, *on its face and under the circumstances in which it is made*, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety." (Pen. Code, § 422, subd. (a), italics added.)

threat . . . was so clear, immediate, unconditional and specific . . . ." Accordingly, the trial court did not err by refusing to modify CALCRIM No. 1300.

C. Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct by appealing to the jurors' sympathy for Allen and by seeking a conviction based on past and future conduct.

During argument, the prosecutor argued: "Well, ladies and gentleman, that's about all of my time. I don't want to keep you anymore. But one thing I want to say is this, you 12 people are the last line of defense for this woman. So this woman has attempted to get away from this man multiple . . . times. This woman has endured physical violence upon this man. Now a court of law told him stay away. He didn't listen to that -- " After defense counsel objected, stating "[it's] going toward punishment that the jury is the last line of protection against Mr. Sample[,]" the trial court noted that the jury had "been ordered not to consider any punishment in its deliberations."[5] The prosecutor then ended his argument by stating that "the only way that he's going to stay away from her and not threaten her anymore is one way, is that you go back there and you send a message to him, do not go near her, do not threaten her anymore, and the only way that that's going to happen is if you find him guilty of the 422."

"'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the *federal* Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under *state law*, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a

---

[5] Defendant asserts that his counsel's objection could have been interpreted as an "improper appeal to the jurors[']passions by asking them to punish [him] out of sympathy for the victim." However, since defense counsel did not state that the prosecutor was appealing to the jurors' sympathy for Allen, the objection was not sufficient to notify the trial court of this basis.

fundamentally unfair trial.' [Citations.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 965-966.)

"When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.] A prosecutor is given wide latitude during closing argument. The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. '"A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness"' [citation], and he may 'use appropriate epithets . . . .'" [Citations.]' [Citation.] 'A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.' [Citation.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 244.)

However, in order to preserve a claim of prosecutorial misconduct, a defendant must make a timely objection, and on the same ground, and also request an admonition. (*People v. Thornton* (2007) 41 Cal.4th 391, 454.)

Defendant contends that if an objection was required to preserve his claim, then his counsel was ineffective in failing to assign misconduct. In order to prevail on an ineffective assistance of counsel claim, the defendant must first show that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) If the defendant meets this initial burden, he or she must then establish prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.)

Even assuming that a reasonably competent counsel would have objected to the prosecutor's statement as an improper appeal for sympathy for Allen, it is not reasonably probable that, but for defense counsel's error, the result of the trial would have been more

favorable to defendant. The prosecutor's comments were brief and the evidence against defendant was overwhelming. Here, Allen testified that defendant threatened to kill her and reported the threat to the 911 operator as defendant was yelling at her. Moreover, her brother heard defendant making the threat as did her neighbor. Based on this record, there was no prejudice to defendant.

D. Right to Jury Trial

Defendant contends that the trial court violated his federal constitutional right to a jury trial on the prior conviction allegations.

Prior to trial, defense counsel indicated that defendant would be waiving his right to a jury trial on the prior conviction allegations. The trial court advised defendant of his right to a jury trial, and questioned him regarding his waiver of this right. Defendant gave some ambiguous responses, and the trial court stated, "At this time, I don't think we have a waiver of jury on the priors." After the jury returned guilty verdicts on the charges, it was dismissed. A court trial was then held on the prior conviction allegations. Defendant did not object.

The right to a jury trial on prior conviction allegations is statutory. (Pen. Code, § 1025.) When a right is based on a statute, as opposed to the constitution, it is subject to forfeiture by the failure to object. (*People v. French* (2008) 43 Cal.4th 36, 46-47; see *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 226-227.) Here, defendant failed to object, and thus has forfeited the issue on appeal.[6]

---

[6] Based on the concurring opinion of Justice Thomas in *Shepard v. United States* (2005) 544 U.S. 13, 27-28, defendant argues that "a change in the law is imminent." This court, however, is bound by current precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III. Disposition

The judgment is affirmed.

_____
Mihara, J.

WE CONCUR:

_____
Premo, Acting P. J.

_____
Elia, J.